APPELLANT PRO SE:

ARNOLD CADE
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IN THE COURT OF APPEALS OF INDIANA

ARNOLD CADE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0705-PC-224
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN COUNTY SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02-D04-0205-PC-84

November 20, 2007

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Arnold Cade appeals from the denial of his petition for post-conviction relief. In particular, Cade argues that he received the ineffective assistance of trial counsel. He also raises a number of arguments related to his guilty plea. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

On December 8, 1986, Cade pleaded guilty to class B felony burglary. The trial court sentenced Cade to ten years imprisonment with eight years suspended to probation.[1] On July 28, 2006, Cade filed a second amended petition for post-conviction relief, arguing, among other things, that he received the ineffective assistance of trial counsel and that his guilty plea was invalid. Following a hearing, the post-conviction court denied Cade's petition on April 6, 2007, finding that he had not received the ineffective assistance of trial counsel and that there were no reversible errors related to his guilty plea. Cade now appeals.

DISCUSSION AND DECISION

I. Effective Assistance of Trial Counsel

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984); Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the

[1] Cade has already served his time for this offense. He seeks post-conviction relief, however, because this conviction served as the underlying offense for a subsequent habitual offender finding.

errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

A. Failure to Object

Although it is not entirely clear, we interpret Cade's first argument to be that his trial counsel was ineffective for failing to object to the admission of a photocopy, rather than the original, of the motion to withdraw his plea of not guilty and enter a plea of guilty. Cade neither cites to the record nor explains at which proceeding the photocopy was admitted into evidence. In any event, Cade does not attempt to establish that he was prejudiced by the failure to object to the photocopy, and indeed, we cannot discern a way in which he was harmed as a result. Thus, we do not conclude that his trial counsel was ineffective on this basis.

Cade also argues that his attorney was ineffective for failing to object to the lack of a factual basis for his guilty plea. Despite attempts, no transcript of the guilty plea hearing was available because the court reporter's twenty-year-old tape recording of the hearing could not be found. The original, handwritten chronological case summary reveals that a guilty plea hearing was held on December 8, 1986, and that Cade entered a plea of guilty. Original CCS p. 1.[2]

The Honorable Philip R. Thieme, the now-retired presiding judge at the guilty plea hearing, executed an affidavit that was entered into evidence at Cade's post-conviction hearing. Although Judge Thieme had no specific recollection of Cade's guilty plea hearing, he attested that his "invariable practice, in all guilty plea hearings in felony cases," was to read from a written form "designed to insure, among other things, that the advisements required by the Constitution of the United States and by the laws of the State of Indiana would be given to the defendant, and that the defendant would indicate his or her understanding of those advisements before entering a plea of guilty." PCR Ex. 1. The written form used by Judge Thieme in conducting guilty plea hearings was attached to the affidavit, and included questions designed to elicit the defendant's statements about what he had done that caused him to believe he was guilty. PCR Ex. 1A. Moreover, when Cade sought to enter his guilty plea, his motion included the following statement:

> I indicate to the Court that either I have been provided with a copy of the charging information or that I have had the charging information

[2] A large portion of Cade's appendix is not paginated consecutively; consequently, we will cite to the name of the document and the internal page number of that document, as needed.

> read to me and that I understand the nature of the charge against me and I understand that a plea of guilty is an admission of the truth of the material facts set forth in the charging information.

PCR Ex. C (emphasis in original).

Although Cade emphasizes the absence of proof that a factual basis was established, noting particularly the absence of a transcript of the guilty plea hearing, our Supreme Court has held that "the fact that a record of a guilty plea hearing can neither be found nor reconstructed does not of itself require granting of post-conviction relief." Hall v. State, 849 N.E.2d 466, 470 (Ind. 2006). Rather, as with any post-conviction claim, the petitioner must establish a violation by a preponderance of the evidence. Id. Because there is a "presumption of regularity to final judgments," it is more difficult for defendants to challenge their guilty pleas many years after the fact in proceedings that are separate and distinct from the underlying criminal proceeding. Id.

Merely pointing to the absence of a transcript, therefore, does not suffice to overcome the presumption of regularity. It is evident that a guilty plea hearing was held. Judge Thieme attested to his invariable practice of questioning defendants at guilty plea hearings, which included establishing a factual basis for the plea. Cade has offered no evidence tending to show that no factual basis was established. Thus, we do not find that his trial counsel was ineffective for failing to object to the absence of a factual basis for Cade's guilty plea.

B. Failure to File an Alibi Notice

Cade next argues that his trial attorney was ineffective for failing to file an alibi notice. An alibi defense demonstrates that a defendant could not have committed the crime. Allen v. State, 813 N.E.2d 349, 369 (Ind Ct. App 2004).

Here, the record reveals that Cade was a passenger in a vehicle that was stopped because of a traffic violation. In the course of the traffic investigation, police officers discovered several items in the vehicle that matched the descriptions of items stolen in a burglary earlier that day. At the post-conviction hearing, Cade testified as follows: "I didn't break in nobody . . . I didn't kick nobody's house in and go in nobody's house and take nothin' . . . I was caught in the car with the burglar with the merchandise, waitin' to take him to go sell it." PCR Tr. p. 31.

Inasmuch as Cade admitted that he was physically near the location of the burglary at the time it occurred, an alibi defense would not have applied. Furthermore, it is clear from that testimony that Cade was an accomplice to the burglary; as such, he bore the ultimate responsibility for the crime even if he did not actually take part in the burglary itself. See I.C. § 35-41-4-2 ("[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense"); Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006) (holding that "the responsibility of a principal and an accomplice is the same"); Bruno v. State, 774 N.E.2d 880, 882 (Ind. 2002) (holding that it is not necessary for a defendant to participate in every element of a crime to be convicted of that crime under accomplice liability). Under these circumstances, Cade's attorney was not ineffective for failing to pursue an alibi defense.

C. Failure to Investigate

Cade next contends that his attorney was ineffective for failing to investigate the case. We afford trial counsel "a great deal of deference" when reviewing an ineffective assistance

claim that is premised on the failure to investigate or prepare for trial. Parish v. State, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). A defendant who makes this claim must establish that the outcome of the case likely would have been different if additional investigation had occurred. Boesch v. State, 778 N.E.2d 1276, 1284 (Ind. 2002). Here, Cade offers no support for his assertion that his attorney failed to investigate. Moreover, even if we assume for argument's sake that Cade's attorney wholly failed to investigate the underlying facts of the case, Cade cannot establish that if there had been an investigation, the outcome of the case would likely have been different. Specifically, Cade admitted at the post-conviction hearing that he was, in fact, "caught in the car with the burglar with the merchandise, waitin' to take him to go sell it." PCR Tr. p. 31. Thus, had Cade's attorney investigated, the result would have been incriminating rather than exculpating. We find, therefore, that Cade has failed to establish that he received ineffective assistance of trial counsel on this basis.

D. Failure to Advise

Next, Cade argues that his attorney was ineffective for failing to advise him that the trial court was not a party to the guilty plea agreement. Where "it is shown that a defendant lacked knowledge of a matter which would have been provided by an omitted plea advisement, he must prove that such knowledge would have changed his decision to plea[d guilty]." Simpson v. State, 499 N.E.2d 205, 206 (Ind. 1986). Here, Cade does not allege that if he had known that the trial court was not a party to the plea agreement, he would not have pleaded guilty. Moreover, Judge Thieme's guilty plea dialogue includes the following question: "Do you further understand that the Court is not a party to this agreement in that the

Court has neither accepted nor rejected the plea agreement?" PCR Ex. 1A. Cade, therefore, has failed to establish that his attorney was ineffective for failing to advise him that the trial court was not a party to the guilty plea agreement.

II. Guilty Plea

A. Not Coerced

The sum total of Cade's argument regarding coercion is as follows: "Judge was without authority when he allowed Petitioner to plea[d] guilty and excepted [sic] Petitioner['s] plea contrary to the law, nor to show that said plea wasn't coerced." Appellant's Br. p. 9. Cade has neither cited to authority or the record nor developed this argument, and we will not endeavor to do so for him. Thus, we do not find that he is entitled to relief based on unspecified coercion to enter into the guilty plea.

B. Boykin Rights

Cade next argues that his guilty plea is invalid because he was not orally advised of his Boykin rights[3] at the guilty plea hearing. As noted above, the transcript of the guilty plea hearing is not available for our review. But the mere fact that the transcript is missing does not, of itself, require post-conviction relief. Hall, 849 N.E.2d at 472. Indeed, the Supreme Court of the United States has commented that "the circumstances of a missing or

[3] In Boykin v. Alabama, 395 U.S. 238, 243 (1969), "the United States Supreme Court held that, before accepting a guilty plea, a trial court must be satisfied that an accused is aware of his rights against self-incrimination, to trial by jury, and to confront his accusers. The Boykin court held that the record must affirmatively show, or there must be an allegation and evidence which shows, that the defendant was informed of, and waived, these rights. Moreover, the Boykin Court made clear that waiver of these rights cannot be presumed from a silent record." Mansfield v. State, 850 N.E.2d 921, 922 n.2 (Ind. Ct. App. 2006) (internal citations omitted), trans. denied.

nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old." Parke v. Raley, 506 U.S. 20, 30 (1992). Here, the prior conviction is over twenty years old. Thus, Cade must provide some other evidence aside from the missing transcript to establish that he was not advised of his Boykin rights. He has not done so.

As explained above, Judge Thieme stated that his invariable practice at guilty plea hearings was to follow a script, which was attached to the judge's affidavit as an exhibit. PCR Ex. 1. The exhibit included an advisement covering the Boykin rights. PCR Ex. 1A. Moreover, the motion to withdraw the plea of not guilty, which was signed by Cade, also included the Boykin rights. PCR Ex. C. Consequently, there is no evidence in the record leading us to conclude that Cade's guilty plea is invalid because of a failure to advise him of his Boykin rights.

C. Advised of the Minimum Sentence

Finally, Cade contends that the trial court failed to advise him of the minimum sentence before he pleaded guilty. The motion to withdraw plea of not guilty, signed by Cade, stated that "I understand the minimum penalty for a Class B felony is a term of imprisonment of six (6) years . . . ." PCR Ex. C. Moreover, Judge Thieme's advisement of rights form addresses the penalties for a class B felony, including the minimum sentence of six years and the maximum sentence of twenty years. PCR Ex. 1A. Under these circumstances, we cannot conclude that Cade was not advised of the minimum sentence for a class B felony conviction such that his guilty plea should be overturned.

The judgment of the post-conviction court is affirmed.

RILEY, J., and BRADFORD, J., concur.